

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands) WT Docket No. 03-66) RM-10586))))))
Part 1 of the Commission's Rules – Further Competitive Bidding Procedures) WT Docket No. 03-67))
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service To Engage in Fixed Two-Way Transmissions) MM Docket No. 97-217))))))
Amendment to Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico) WT Docket No. 02-68) RM-9718)))))
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets) WT Docket No. 00-230))

To: The Commission

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("BloostonLaw"), on behalf of its clients in the Broadband Radio Service listed on Attachment A hereto and pursuant to Section 1.429(f) of the Commission's Rules, hereby opposes the various "Petitions for Reconsideration" ("Petitions") filed by C&W Enterprises, Inc. ("C&W"), SpeedNet, L.L.C. ("SpeedNet"), Wireless Direct Broadcast

System (“WDBS”) and Digital Broadcast Corporation (“DBC”) (collectively “the Petitioners”) insofar as they request reconsideration of the action taken by the Commission in the Report and Order and Further Notice of Proposed Rulemaking, FCC 04-135, released July 29, 2004 (“R&O”) allowing cable operators and Independent Local Exchange Carriers (“ILECs”) to acquire Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) spectrum.¹ In support hereof, the following is shown:

Statement of Interest

1. BloostonLaw’s clients are licensees in the Broadband Radio Service serving predominantly rural areas in the United States; and each is an ILEC or a subsidiary or affiliate of an ILEC. Accordingly, BloostonLaw’s clients have an interest in any changes to the licensing and service rules adopted by the Commission.

The Requested Cross-Ownership Restrictions Should Not Be Imposed

2. The Petitioners request reconsideration of the Commission’s decision to allow cable operators and ILECs to acquire BRS and EBS spectrum for the provision of broadband data services, advancing positions previously espoused in this proceeding by Earthlink, Inc. (“Earthlink”) and Teton Wireless Television, Inc. (“Teton”) and decisively rejected by the Commission in the R&O. See C&W Petition, pp. 5 – 6; SpeedNet Petition, pp. 4-5; WDBS Petition, pp. 4-6; and DBC Petition, pp. 5 – 6. As was the case with Earthlink and Teton, the Petitioners argue that allowing such entities access to the spectrum will thwart competition and encourage the associated warehousing of spectrum.

¹ The Petitions were listed on the Commission’s *Public Notice*, Report No. 2691, dated January 31, 2005. Since this opposition is being filed within 15 days of the date of *Public Notice*, it is timely under Sections 1.4(b)(1), 1.429(e) and 1.429(f) of the Rules.

3. The Petitioners conveniently fail to acknowledge that no statutory or public interest basis exists to grant the sweeping relief that they request; and that these issues were properly addressed by the Commission in the R&O.

4. Section 613(a) of the Communications Act of 1934, as amended (“the Act”), generally prohibits a cable operator from holding “a license for multichannel multipoint distribution service ... in any portion of the franchise area served by the cable operator’s cable system.” Section 613(a) of the Act goes on to state that the “Commission may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming.” Accordingly, the Section 613(a) cross-ownership restriction is confined to cable operators, but only to the extent of their video programming operations. The statute does not prohibit the use of Multichannel Multipoint Distribution Service (“MMDS”) spectrum by cable operators to provide broadband service. Similarly, the statute does not prohibit ILECs from using MMDS spectrum to provide broadband services, such as Digital Subscriber Line (“DSL”) service.

5. In the R&O, the Commission correctly characterized the purposes behind the statutory cable/MMDS cross-ownership restrictions as addressing “a concern ‘that common ownership of different means of **video distribution** may reduce competition and limit the diversity of voices available to the public’ and to prevent a cable operator from warehousing potential competition.” R&O, Para. No. 172 *citing* 1993 Cable Report and Order, 8 FCC Rcd. 6828, 6841 Para Nos. 92 – 94 (1993) (emphasis added). Accordingly, the Commission determined that, subject to the present exceptions in the Rules, it will continue to prohibit cable operators from holding BRS/EBS licenses and

using those licenses to offer multichannel video programming service. R&O, Para. No. 172. However, the Commission further concluded that it will not prohibit cable operators from acquiring and using the licenses to provide broadband data services because “Section 613(a) does not apply to broadband services.” R&O, Para. No. 173.

6. Similarly, the Commission declined to prohibit use of the spectrum by ILECs to provide broadband services, such as DSL. The Commission noted that “there is no statutory prohibition similar to Section 613 that would require us to consider cross-ownership restrictions and, in any event, ILECs already have access to MDS/ITFS spectrum and this existing eligibility has caused no apparent problems.” R&O, Para. No. 174. In this regard, the Commission expressly rejected the argument that Section 652 of the Act provided a statutory basis for such a restriction, noting that Section 652 “prohibits cross-ownership of an ILEC and a cable television system,” and that nothing in that section of the Act addresses eligibility restrictions on radio spectrum. R&O, Para. No. 174.

7. Despite these bases for declining to impose cross-ownership restrictions, the Petitioners (like Earthlink and Teton before them) nevertheless still favor their imposition. The Petitioners take issue with the Commission’s statement in Paragraph No. 175 of the R&O that eligibility restrictions are only imposed when there is a significant likelihood of substantial competitive harm and eligibility restrictions will be effective in addressing such harm; and that, under this standard, “the Commission relies on market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary.” According to the Petitioners, because the use of BRS spectrum to provide data services is a comparatively recent

development, there are no relevant market facts and circumstances to cite in support of their position. Thus, the Petitioners admit, for all practical purposes, that they cannot craft an argument in support of their requested relief that meets the Commission's clearly articulated standards.

8. Similarly, the Petitioners' argument that the absence of the requested cross-ownership restrictions will encourage warehousing of spectrum for anticompetitive purposes is unsupported by any evidence and should be rejected. To the extent that cable operators and ILECs act in an unlawful manner, the Petitioners are always free to seek relief under applicable trade regulation laws.

9. The Petitioners WDBS and DBC advance an additional argument. According to these Petitioners, the Commission should amend Section 27.1202 of the new Rules to (at the very least) preclude cable operators and ILECs from acquiring licenses in the Middle Band Segment ("MBS") of the new band plan because these channels are reserved for high-powered video operations. According to WDBS and DBC, the Commission has precluded cable operators and ILECs from acquiring licenses in the MBS for the provision of video service. See WDBS Petition, pp. 5 – 6; DBC Petition, pg. 6.

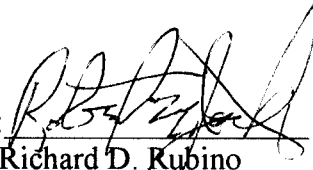
10. WDBS' and DBC's argument is not well-founded. First, nothing in the new Rules prohibits the use of the MBS channels to provide data services. Second, new Section 27.1202 of the Rules codifies the prohibition against cable operators using BRS channels to provide a multichannel video programming service. Consistent with the actions taken in Paragraph Nos. 172 – 176 of the R&O, the rule does not prohibit ILECs from using the channels to provide video programming.

WHEREFORE, BloostonLaw requests that the Petitions be denied.

Respectfully submitted,

**Blooston, Mordkofsky,
Dickens, Duffy &
Prendergast**

Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037
Tel: 202-828-6950
FAX: 202-828-5568

By: 
Richard D. Rubino
Robert M. Jackson
Its Attorneys

Dated: February 14, 2005

ATTACHMENT A

- 1) Consolidated Telcom
- 2) The Hinton CATV Company, Inc.
- 3) North Dakota Network Co.
- 4) West River Cooperative Telephone Co. and G.W.
Wireless, Incorporated Partnership

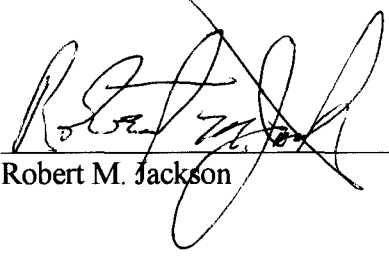
CERTIFICATE OF SERVICE

I hereby certify that I am an attorney with the law offices of Blooston, Mordkofsky, Dickens, Duffy & Prendergast and that on February 14, 2005 I caused to be mailed by first class United States mail, postage prepaid, a copy of the foregoing "**Consolidated Opposition to Petitions for Reconsideration**" to the following:

Suzanne S. Goodwyn, Esquire
P.O. Box 5248
San Angelo, Texas 76902
Attorney for C&W Enterprises, Inc.

Suzanne S. Goodwyn, Esquire
843 Stag Ridge Road
Rochester, Michigan 48309
Attorney for SpeedNet, L.L.C.

Suzanne S. Goodwyn, Esquire
1661 Hunting Creek Drive
Alexandria, Virginia 22314
Attorney for Wireless Direct Broadcast System
and Digital Broadcast Corporation


Robert M. Jackson